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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/725,997	12/03/2003	Martin A. Van Der Hoeven	616782000100	5192
25225 7590 07/08/2009 MORRISON & FOERSTER LLP 12531 HIGH BLUFF DRIVE SUITE 100 SAN DIEGO, CA 92130-2040				
EXAMINER				
RICHTMAN, GLENNE				
ART UNIT		PAPER NUMBER		
3764				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/725,997

Applicant(s)

VAN DER HOEVEN, MARTIN A.

Examiner

/Glenn Richman/

Art Unit

3764

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 31 March 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-45 is/are pending in the application.
- 4a) Of the above claim(s) 19-45 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4, 7, 8, 11, 12, 15 and 16 is/are rejected.
- 7) ☒ Claim(s) 5, 6, 9, 10, 13, 14, 17 and 18 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

The rejection from the prior office action is maintained and incorporated by reference.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-3, 8, 11, 12 are rejected under 35 U.S.C. 102(e) as being anticipated by Lee et al.

Lee discloses determining that the exercise activity should be performed according to a first muscular phase col. 8, lines 21 – et seq.; providing a first user perceptible output from the coaching device to prompt the user to operate the exercise apparatus according to the first muscular phase col. 8, lines 21 – et seq.; determining that the exercise activity should be performed according to a second muscular phase that differs from the first muscular phase col. 8, lines 21 – et seq.; and providing a second user perceptible output from the coaching device to prompt the user to operate the exercise apparatus according to the second muscular phase, wherein the second

user perceptible output differs from the first user perceptible output col. 8, lines 21 – et seq., determining that the exercise activity should be performed according to a third muscular phase that differs from the first and second muscular phases; and providing a third user perceptible output from the coaching device to prompt the user to operate the exercise apparatus according to the third muscular phase, wherein the third user perceptible output differs from the first and second user perceptible outputs col. 8, lines 21 – et seq., the first, second and third user perceptible outputs comprise a visual display col. 8, lines 21 – et seq., wherein the first, second and third user perceptible outputs comprise an audio output col. 8, lines 21 – et seq., the first and second user perceptible outputs comprise a visual display col. 8, lines 21 – et seq.,

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 4, 7, 12, 15 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lee et al.

Lee does not specifically detail the first muscular phase is a concentric phase, the second muscular phase is an eccentric phase, and the third muscular phase is an isometric phase. the concentric, eccentric, and isometric phases each last for 2 to 8 seconds, however they are obvious design choices as they are well known variants if performing an exercise routine and are the various species of claims 12, 15 and 16.

Allowable Subject Matter

Claims 5, 6, 9, 10, 13, 14, 17 and 18, are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Arguments

Applicant's arguments filed 3/31/09 have been fully considered but they are not persuasive.

As to the applicant's arguments:

1. Lee does not teach or suggest determining whether an exercise activity should be performed according a muscular phase, and providing user perceptible output prompting a user to operate an exercise device according to that muscular phase, as recited in independent claim 1. To this end, Applicant would like to take the opportunity to clarify that prompting a user to operate an exercise device according to different muscular phases, as recited in independent claim 1, is different from a device that merely instructs a user to modify his or her exercise speed, as disclosed in Lee. For example, in the Office Action, the Examiner cites to col. 8, lines 21 et seq. of Lee as purportedly disclosing that the Lee device determines whether an exercise device should be operated according to a first or second muscular phase. Lee, however, only discloses ways in which the device communicates to a user to modify his or her pace to reach his or her performance goal of moving a particular geographic-tracked distance over a specified amount of time. (See e.g., col. 9:26-28 ("The device 10 then assists the user in reaching a constant pace."); and col. 10:3-7 ("For example, the device 10 may

maintain a slow speed during a first interval, gradually increase the speed during a next interval to reach a higher speed, maintain the higher speed during a next interval, then gradually decrease the speed during a final interval.".)

In contrast, independent claim 1 relates to prompting a user to operate an exercise device according to different muscular phases. As described in the present application, muscular phases are isokinetic, isometric, concentric, and eccentric. The isokinetic muscular phase is achieved through quick repetitive motion, while the isometric muscular phase is achieved through the tightening and holding of these tightened muscles. The concentric muscular phase is achieved through the slow contraction of muscles, while the eccentric muscular phase is achieved through the slow relaxation of the muscles under a load. ([0002].) Merely modifying a user's speed, as disclosed in Lee, does not teach or suggest instructing a user to operate an exercise device according to different muscular phases.

As to 1 above, to the extent broadly claimed, Lee discloses a first and second muscular phase, and providing an audible output as different muscular phases will be reached in achieving the stated running goals.

2. In the Office Action, the Examiner alleges that Lee does not specifically detail the first muscular phase is a concentric phase, the second muscular phase is an eccentric phase, and the third muscular phase is an isometric phase. [T]he concentric, eccentric and isometric phases each last 2 to 8 seconds, however they are obvious design choices as they are well known variants if performing an exercise routine and are the various species of claims 12, 15 and 16. (Office Action, p. 3.) Applicant

respectfully traverses this rejection. As an initial matter, the Examiner has failed to provide any evidence that performing these exercises, or, for that matter, performing these exercises in the recited time intervals, would be obvious design choices of purported well known variants of performing an exercise routine. As discussed in MPEP § 2144.03, "It would not be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known."

Here, Applicant respectfully submits that the limitations recited in claims 4, 7, 12, 15 and 16 are not "capable of instant and unquestionable demonstration as being well-known," as different types of exercises and exercise devices are operated in different manners. Accordingly, Applicant requests that the Examiner provide evidence supporting this allegation in order to maintain this rejection, in accordance with MPEP § 2144.03.

As to 2 above, official notice may be taken when the facts are well known. Various exercise routines are well documented and well known in the art. Merely taking the step of the exercise routine and providing a n audio output, regardless of the specific exercise routine, would be an obvious design choice. It's further obvious, as the claim requires no structure to perform the given steps, i.e., the method could be performed by a coach or trainer giving verbal feedback. and Lee's disclosure of providing verbal feedback .

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Glenn Richman whose telephone number is 571-272-4981. The examiner can normally be reached on Mon-Thurs.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, LoAn Thanh can be reached on (571)272-4966. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Glenn Richman/
Primary Examiner
Art Unit 3764